



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary

Date: December 2, 2015

To: Board of Agriculture, Trade, and Consumer Protection

From: Ben Brancel, Secretary
Dr. Steve Ingham, Administrator, Division of Food Safety

Steve Ingham

Subject: Rulemaking Scope Statement for Ch. ATCP 75 which involves Ch. ATCP 75 (Retail Food Establishments), and Ch. ATCP 75 Appendix (Wisconsin Food Code), and parts of Ch. ATCP 55 (Meat and Meat Products), Ch. ATCP 70 (Food Processing Plants), and Ch. ATCP 88 (Eggs).

Presented by: Dr. Steve Ingham and Arthur Ness, Division of Food Safety.

Requested Action:

At the December 18, 2015, Board meeting, the Department of Agriculture, Trade, and Consumer Protection (DATCP) will ask the Board to approve a Statement of Scope (copy attached) to allow DATCP to begin revising ch. ATCP 75 and its Appendix (Wisconsin Food Code). This revision is necessary to accommodate the transfer of programs regulating restaurants and vending machines from the Department of Health Services (DHS) to DATCP, effective July 1, 2016. Revisions to the Wisconsin Food Code may affect exemptions from other food business license requirements, so the Scope Statement also includes possible revision to chs. ATCP 55 (Meat and Meat Products), ATCP 70 (Food Processing Plants), and ATCP 88 (Eggs). Approval of companion scope statements by DHS will also allow DATCP and DHS staff to identify approaches for consolidating and amending DHS rules which will be transferred to DATCP on July 1, 2016, with the merger of DATCP's Division of Food Safety and DHS's Food Safety and Recreational Licensing Section (FSRL).

A primary objective of this rule revision is to amend ch. ATCP 75 Appendix, the Wisconsin Food Code, to conform to the 2013 FDA Model Food Code, with policies and procedures used by both DHS and DATCP in current food safety practice, and to reflect additional modifications proposed by the National Conference on Food Protection (NCFP), that conform with modern industry practices.

This proposed rule revision is part of the transfer of food safety and recreational licensing regulations from DHS to DATCP. 2015 Act 55 authorized the transfer of the DHS's FSRL Section to DATCP's Division of Food Safety, effective July 1, 2016. On July 1, 2016, DHS 196 will be renumbered as subch. III of ATCP 75. Both DATCP and DHS adopt identical versions of the Wisconsin Food Code and only one version of the amended Wisconsin Food Code will be needed, as an appendix to the amended version of ATCP 75, after the effective date of the transfer. In addition, on July 1, 2016, subch. III of ATCP 75 (Local Regulation of Retail Food Establishments) will be renumbered and become a subchapter of a newly created ATCP 74. DHS 198 (Vending of Food) will be renumbered as a newly created subch. IV of ATCP 75.

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If the Board approves the Scope Statement, DATCP and DHS staff will begin the work on chs. ATCP 75 and ATCP Appendix (Wisconsin Food Code) and the DHS rules, which will transfer to DATCP on July 1, 2016, to review, reconcile, and revise them as part of the transfer of regulatory, administrative, licensing, and local agent program oversight to DATCP beginning July 1, 2016.

This Scope Statement spells out the general purpose and scope of the proposed rule and appendix to the rule. DATCP may not begin drafting a proposed rule (including a proposal to amend or repeal an existing rule) until the Governor approves a scope statement for the proposed rule and the DATCP Board approves the scope statement. In accordance with 2011 Act 21 (s.227.135(2), Stats.), the Governor approved this Scope Statement for rule review and revision on December 2, 2015, thereby allowing DATCP to submit this Scope Statement for publication and to seek approval of the Scope Statement by the DATCP Board.

DATCP must publish a draft Scope Statement in the Wisconsin Administrative Register, and file a scope with the Department of Administration (DOA), at least 10 days before the Board approves the Scope Statement. DATCP filed the attached Scope Statement with the Legislative Reference Bureau for publication in the December 7, 2015 issue of the Wisconsin Administrative Register. DATCP also filed a copy with the DOA.

Approval of the Scope Statement is just the first, preliminary step in a lengthy process for enacting permanent rules. The Board will have at least two further opportunities to review the proposed rules. The Board must approve hearing draft rules before DATCP may hold public hearings on the rule proposal. The Board must also approve the final draft rule before DATCP may adopt the rule. The permanent rule will only be effective when the final draft rule has been approved by the Governor, approved by the DATCP Board, completed the legislative review process, and adopted by the Secretary.

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection (DATCP)

Rule No: ATCP 75 (Retail Food Establishments) and ATCP 75 Appendix (Wisconsin Food Code), ATCP 55 (Meat and Meat Products), ATCP 70 (Food Processing Plants), and ATCP 88 (Eggs)

Relating to: Retail Food Establishments

1. Description of the objective of the rule:

The primary objective of this rule revision is to amend ATCP 75 Appendix, "Wisconsin Food Code" to conform to the 2013 Federal Model Food Code, with policies and procedures used by both the Department of Health Services (DHS) and the Department of Agriculture, Trade and Consumer Protection (DATCP) in current food safety practice, and to reflect additional modifications proposed by the National Conference on Food Protection (NCFP).

This proposed rule revision is part of the transfer of food safety and recreational licensing regulations from DHS to DATCP. 2015 Wisconsin Act 55 authorized the transfer of the DHS's Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety, effective July 1, 2016. On July 1, 2016, DHS 196 will be renumbered as subch. III of ATCP 75. Both DATCP and DHS adopt identical versions of the Wisconsin Food Code and only one version of the amended Wisconsin Food Code will be needed as an appendix to the amended version of ATCP 75 after the effective date of the transfer. In addition, on July 1, 2016, subch. III of ATCP 75 (Local Regulation of Retail Food Establishments) will be renumbered and become a subchapter of a newly created ATCP 74. DHS 198 (Vending of Food) will be renumbered as a newly created subch. IV of ATCP 75.

DATCP will work cooperatively with DHS to establish a Food Code Advisory Committee consisting of stakeholders to provide advice on the content of rule amendments and best approaches for consolidating rules.

Adopting this scope statement will allow DHS and DATCP to begin work amending chs. DHS 196 and DHS 196 Appendix and identifying approaches for consolidating portions of ch. DHS 196 in ch. ATCP 75 and ATCP 75 Appendix in preparation for the upcoming consolidation. It will also allow DHS and DATCP staff to review and revise, if necessary, retail food exemption provisions found in other DATCP rules, specifically ATCP 55, 70, and 80. Approval of companion scope statements will also allow DHS and DATCP staff to identify approaches for consolidating and amending other DHS rules related to the consolidation.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

History and Background. Under current law, DHS and DATCP divide regulatory authority over food safety. Under ch. DHS 196, DHS regulates food safety in restaurants. Under ch. ATCP 75, DATCP regulates food safety in retail food establishments such as grocery stores, supermarkets and most convenience stores. 2015 Wisconsin Act 55 transfers regulatory authority over food safety in restaurants from DHS to DATCP on July 1, 2016. From a regulatory perspective, restaurants will be categorized as a type of retail food establishment.

The Federal Model Food Code is fully updated every four years to provide practical, science-based guidance and enforceable provisions for mitigating risk factors known to cause foodborne illness. The 2013 Federal Model Food Code is the most recent full edition published by the FDA. However, the current Wisconsin Food Code, appended to ch. ATCP 75 for retail food establishments and to ch. DHS 196 for restaurants, is based on the 2009 version of the Federal Model Food Code.

Consolidation with DATCP Division of Food Safety. The transfer of the DHS's Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety will improve services for Wisconsin's food and recreational industries. It will create a "one-stop" contact point for restaurants and retail food establishments, making it much easier for them to quickly get licensed and have their questions answered. Most significantly for this proposed rule revision, it will continue consistent oversight of restaurants and other retail food establishments in Wisconsin. Both restaurants and retail food establishments (grocery stores, etc.) are already regulated under the same Wisconsin Food Code. Having one agency interpret the Wisconsin Food Code using one set of regulations will encourage consistency. Amending ATCP 75 Appendix, the Wisconsin Food Code, will ensure that industry and government have a rule that is based on the most updated guidance.

Proposed Policies. The proposed rule aims to revise the Wisconsin Food Code to incorporate changes in the 2013 Federal Model Food Code, while retaining certain regulations that are unique to Wisconsin. This rule will ensure that the Wisconsin Food Code is in step with the latest model food safety regulations, which will reduce confusion and increase efficiency for concerned stakeholders in the retail food and restaurant industries.

The proposed rule will also explore approaches for reconciling any differences between chs. ATCP 75 and DHS 196 in order to facilitate the transfer of regulatory authority over food safety in restaurants from DHS to DATCP. Reconciling any differences between chs. ATCP 75 and DHS 196 will bring consistency to the Wisconsin Food Code and associated regulations and provide clarity to operators of retail food and restaurant businesses.

Proposed rulemaking activities will also focus on integrating provisions from ch. DHS 198 related to vending machines, which are scheduled to be transferred to DATCP on July 1, 2016, with ATCP 75. Finally, rulemaking activities will also examine whether and to what extent the consolidation will require revisions related specifically to retail food exemption provisions in

DATCP rules, including ATCP 55 (Meat and Meat Products), ATCP 70 (Food Processing Plants), and ATCP 88 (Eggs).

Related Rulemaking Activities

In addition to this scope statement, DHS has prepared three scope statements to facilitate the transfer of the Food Safety and Recreational Licensing Section regulations to DATCP's Division of Food Safety. First, they prepared a scope statement for DHS 196 (Restaurants) and DHS 196 Appendix (Wisconsin Food Code), which will be consolidated with ATCP 75 on July 1, 2016. The goal of this rulemaking activity will be to begin working with restaurant owners and other stakeholders to update the Wisconsin Food Code and to seek approaches for consolidating DHS 196 with ATCP 75 on July 1, 2016.

DHS has also prepared a scope statement for revising DHS 192. Regulatory authority for DHS 192 (Cities, Counties, and Villages Designated as Agents of the Department for Public Health) will also be transferred to DATCP on July 1, 2016 and DHS 192 will be renumbered as a newly created ATCP 74 (Local Agents and Regulation.) At that time, subch. III of ATCP 75 (Local Regulation of Retail Food Establishments) will also become a subchapter of ATCP 74. The goal of this rulemaking activity will be to work with local health agents and other stakeholders to develop rules that integrate DHS and DATCP approaches for regulating local health agents and developing one integrated set of rules to ensure a single, consistent approach for regulating local health agents.

Finally, DHS has prepared a scope statement for DHS 198 (Vending of Food). DHS 198 will be renumbered as a newly created subch. IV of ATCP 75 on July 1, 2016. Under this proposed rulemaking activity, DHS and DATCP staff will work with stakeholders to evaluate the content of DHS 198 and determine how to streamline these regulations, transferring relevant provisions into ATCP 75 and ATCP 75 Appendix (Wisconsin Food Code), and eliminating any duplicative provisions.

Adopting this scope statement, along with the companion scope statements from DHS, will allow DHS and DATCP to begin work amending and consolidating rules. It will minimize the amount of time between when DHS rules are transferred to DATCP in their current form and adoption of streamlined rules that will be easier for industry to use.

Policy Alternatives. Do nothing. If DATCP does nothing, then the Wisconsin Food Code will be out of step with the current Federal Model Food Code. In addition, food business operators will have to meet requirements for sous vide processing and reduced oxygen packaging that are more onerous than those now accepted as sufficient for safety. The Wisconsin Food Code's provisions may no longer be based on the latest science and food customers may be protected less effectively and efficiently. Furthermore, if DATCP does not reconcile differences between chs. ATCP 75 and DHS 196 in light of the transfer of regulatory authority over food safety in restaurants, then concerned stakeholders may be faced with conflicting rules across the range of retail food establishment activities. If DATCP and DHS do not begin identifying approaches for integrating rules that are scheduled to be transferred, it will delay implementation of a simplified, streamlined regulatory system for Wisconsin's retail food industry.

6. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

DATCP estimates that it will use approximately .50 FTE staff time to develop this rule. This includes research, drafting, preparing related documents, holding public hearings, and communication with affected persons and groups. DATCP will assign existing staff to develop this rule. DATCP will work jointly with DHS staff to facilitate seamless consolidation of DHS regulations with ATCP 75.

7. Anticipated economic impact

The proposed rule is not expected to have any negative economic impact and will positively affect operators of food service operations, state and local food safety inspectors, and the public health. By adopting the most current practices in food safety, the proposed rule revision will ensure Wisconsin's food regulations reflect best practice for protecting public health. If adopted, the proposed rule will include less onerous provisions for sous vide processing and reduced oxygen packaging. As part of the larger initiative to consolidate and streamline Wisconsin's food safety programs, it will remove unnecessary duplication of regulations and ensure consistent interpretation of retail food regulations. It will make it easier for retail food establishment operators, including restaurant owners, to know who to contact for information with licensing and regulatory questions. Both DATCP and DHS will work closely with stakeholders to ensure the rule revisions protect public health without imposing an undue economic burden. The rule will not raise fees.

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Ben Brancel

Secretary

Department of Agriculture, Trade and Consumer Protection

10.22.15

Date Submitted

STATEMENT OF SCOPE

Department of Health Services

(DHS)

Rule No.: DHS 192 (Cities, Counties and Villages Designated as Agents of the Department for Public Health Protection Purposes)

Relating to: Local Health Agents

1. Description of the objective of the rule:

The primary objective of this rule revision is to amend, clarify and modernize DHS 192, consolidate the rule with similar provisions found in ATCP 75 and facilitate the transfer of the rule to the Department of Agriculture, Trade and Consumer Protection (DATCP).

This proposed rule revision is part of an initiative to transfer food safety and recreational licensing regulations from the Department of Health Services (DHS) to DATCP. 2015 Wisconsin Act 55 authorized the transfer of the DHS's Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety, effective July 1, 2016. As part of that consolidation, ch. DHS 192 will be renumbered as subch. I of a newly created ch. ATCP 74 (Local Agents and Regulation) on the effective date of the transfer.

Although the rule will be transferred and incorporated into ch. ATCP 74 on July 1, 2016, additional revisions will be necessary to create a comprehensive, streamlined foundation for regulating the oversight of local health agents. To avoid delay in creating the comprehensive streamlined foundation the rulemaking process will begin with this statement of scope from DHS and will continue and be completed by DATCP so that a rule will be in effect as soon after the transfer date as possible.

DHS will collaborate with DATCP to work with stakeholders, including local health agents, who will provide advice on the content of rule amendments and best approaches for consolidating DHS 192 and subch. III of ch. ATCP 75 into ch. ATCP 74. Adopting this scope statement will allow DHS and DATCP to begin the work amending ch. DHS 192 and identifying approaches for consolidating the rule with the existing provisions found in subch. III of ch. ATCP 75.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

History and Background. State law allows local health departments, in jurisdictions with a population of more than 5,000, to contract with the state to inspect retail food and recreational establishments within their jurisdictions. Section 254.69, Stats., allows these "local agents" to contract with DHS to license and inspect local restaurants and other retail food and recreational

businesses regulated by DHS. Similarly, s. 97.41, Stats., authorizes local agents to contract with DATCP to license and inspect all other types of local retail food establishments. DHS contracts with 53 local health departments and DATCP contracts with 43 local agents. Many local agents hold two contracts (one each with DATCP and DHS) so they can inspect the full range of retail food establishments, but 12 agencies contract only with DHS and one holds a contract with DATCP only.

The number of local health departments operating as local agents has grown over time, such that approximately 60 percent of restaurant and retail food establishment licensees are now under local agent jurisdiction. While state agencies have directly licensed fewer retail food establishments over time, they have assumed new and complex contract management, training, and oversight responsibilities in order to standardize local inspections and monitor overall program effectiveness. The increasing proportion of retail food establishments inspected by local agents has also created logistical challenges for efficiently scheduling retail food inspections as a “checkerboard” of agent and state jurisdictions has been created. Combining inspection staffs for retail food and recreational business inspections will mitigate this effect by producing smaller sanitarian work-areas and thereby reducing the travel needed to conduct inspections.

Consolidation with DATCP Division of Food Safety. The transfer of DHS’s Food Safety and Recreational Licensing Section to DATCP’s Division of Food Safety will improve services for local agents. Consolidation will provide a one-stop contact for local agents and reduce duplication in the local health agent program. For example, under the proposed consolidation, local agents will only need to negotiate one contract related to food and recreational licenses rather than two contracts with two state agencies. Efficiencies may also be gained in providing interpretations and training, and overseeing local health agent programs. This proposed rulemaking initiative will provide the necessary regulatory foundation for these critical reforms in the oversight of local health agent programs.

Proposed Policies. The proposed rule is intended to streamline and consolidate provisions in DHS 192 with similar provisions found in subch. III of ch. ATCP 75. It will create a single, comprehensive set of regulations governing local health agent programs, eliminating duplication and inefficiencies created by two separate oversight systems, as was intended with the consolidation of the programs into DATCP by 2015 Wisconsin Act 55.

Related Rulemaking Activities. This scope statement is one of three scope statements prepared by DHS to facilitate the transfer of the Food Safety and Recreational Licensing Section to DATCP’s Division of Food Safety. The other scope statements are for chs. DHS 196 and its appendix and DHS 198.

DHS has also prepared a scope statement for DHS 196 (Restaurants) and DHS 196 Appendix (Wisconsin Food Code). The goal of that rule revision is to update the food code to reflect the most recent version of the FDA model food code and to consolidate DHS 196 with the DATCP’s ATCP 75 and ATCP 75 Appendix.

In addition, DHS also prepared a scope statement for DHS 198 (Vending of Food). DHS 198 will be renumbered as a newly created subch. IV of ATCP 75 on July 1, 2016. DHS and DATCP staff will work with stakeholders to evaluate the content of DHS 198 and determine whether or how to streamline these regulations, transferring relevant provisions into ATCP 75 Appendix (Wisconsin Food Code) and eliminating any duplicative provisions.

In addition to the three scope statements prepared by DHS, DATCP has also prepared a scope statement for ATCP 75 and ATCP 75 Appendix to amend regulations related to retail food establishments and to consolidate DHS restaurant and vending regulations transferred to DATCP on July 1, 2016.

Policy Alternatives. Do nothing. DHS 192 will be transferred to DATCP on July 1, 2016 and incorporated as subch. I of a newly created ATCP 74. Subch. III of ATCP 75 will also be renumbered as subch. II of ATCP 74 on that date. If DHS and DATCP do nothing further, ch. ATCP 74 will include provisions that are duplicative. If DHS and DATCP do not begin identifying approaches for integrating rules that are scheduled to be transferred, it will delay implementation of a simplified, streamlined regulatory system for Wisconsin's local health agents and their stakeholders in the process.

3. Statutory authority for the rule (including the statutory citation and language): Statutory Authority: Section 254.69 Stats.

254.69 Agent status for local health departments.

(1) **VENDING OPERATIONS.** In the administration and enforcement of this subchapter, the department may use local health departments as its agents in making inspections and investigations of vending machine commissaries, vending machine operators and vending machines if the jurisdictional area of the local health department has a population greater than 5,000. If the designation is made and the services are furnished, the department shall reimburse the local health department furnishing the service at the rate of 80% of the net license fee per license per year issued in the jurisdictional area.

(2) **HOTELS, RESTAURANTS, TOURIST ROOMING HOUSES AND OTHER ESTABLISHMENTS.** (am) In the administration of this subchapter or s. 254.47, the department may enter into a written agreement with a local health department with a jurisdictional area that has a population greater than 5,000, which designates the local health department as the department's agent in issuing permits to and making investigations or inspections of hotels, restaurants, temporary restaurants, tourist rooming houses, bed and breakfast establishments, campgrounds and camping resorts, recreational and educational camps and public swimming pools. In a jurisdictional area of a local health department without agent status, the department of health services may issue permits, collect fees established by rule under s. 254.68 and make investigations or inspections of hotels, restaurants, temporary restaurants, tourist rooming houses, bed and breakfast establishments, campgrounds and camping resorts, recreational and educational camps and public swimming pools. If the department designates a local health

department as its agent, the department or local health department may require no permit for the same operations other than the permit issued by the local health department under this subsection. The department shall coordinate the designation of agents under this subsection with the department of agriculture, trade and consumer protection to ensure that, to the extent feasible, the same local health department is granted agent status under this subsection and under s. 97.41. Except as otherwise provided by the department, a local health department granted agent status shall regulate all types of establishments for which this subchapter permits the department of health services to delegate regulatory authority.

(b) A local health department granted agent status under this subsection shall meet standards promulgated, by rule, by the department of health services. The department shall annually evaluate the licensing, investigation and inspection program of each local health department granted agent status. If, at any time, a local health department granted agent status fails to meet the standards, the department of health services may revoke its agent status.

(c) The department shall provide education and training to agents designated under this subsection to ensure uniformity in the enforcement of this subchapter, s. 254.47 and rules promulgated under this subchapter and s. 254.47.

(d) Except as provided in par. (dm), a local health department granted agent status under this subsection shall establish and collect the permit fee for each type of establishment. The local health department may establish separate fees for preinspections of new establishments, for preinspections of existing establishments for which a person intends to be the new operator or for the issuance of duplicate permits. No fee may exceed the local health department's reasonable costs of issuing permits to, making investigations and inspections of, and providing education, training and technical assistance to the establishments, plus the state fee established under par. (e). A local health department granted agent status under this subsection or under s. 97.41 may issue a single permit and establish and collect a single fee which authorizes the operation on the same premises of more than one type of establishment for which it is granted agent status under this subsection or under s. 97.41.

(dm) A local health department granted agent status under this subsection may contract with the department of health services for the department of health services to collect fees and issue permits. The department shall collect from the local health department the actual and reasonable cost of providing the services.

(e) The department shall establish state fees for its costs related to setting standards under this subchapter and s. 254.47 and monitoring and evaluating the activities of, and providing education and training to, agent local health departments. Agent local health departments shall include the state fees in the permit fees established under par. (d), collect the state fees and reimburse the department for the state fees collected. For each type of establishment, the state fee may not exceed 20% of the permit fees charged under ss. 254.47 and 254.68.

(f) If, under this subsection, a local health department becomes an agent or its agent status is discontinued during a permittee's permit year, the department of health services and the local health department shall divide any permit fee paid by the permittee for that permit year according to the proportions of the permit year occurring before and after the local health department's agent status is granted or discontinued. No additional fee may be required during the permit year due to the change in agent status.

(g) A village, city or county may adopt ordinances and a local board of health may adopt regulations regarding the permittees and premises for which the local health department is the designated agent under this subsection, which are stricter than this subchapter, s. 254.47 or rules promulgated by the department of health services under this subchapter or s. 254.47. No such provision may conflict with this subchapter or with department rules.

(h) This subsection does not limit the authority of the department to inspect establishments in jurisdictional areas of local health departments where agent status is granted if it inspects in response to an emergency, for the purpose of monitoring and evaluating the local health department's licensing, inspection and enforcement program or at the request of the local health department.

(j) The department shall hold a hearing under ch. 227 if any interested person, in lieu of proceeding under ch. 68, appeals to the department alleging either of the following:

1. A permit fee established by a local health department granted agent status exceeds the reasonable costs described under par. (d).
2. The person issuing, refusing to issue, suspending or revoking a permit or making an investigation or inspection of the appellant has a financial interest in a regulated establishment which may interfere with his or her ability to properly take that action.

4. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

There is no federal law related to regulating local health agents.

5. Description of all entities that may be impacted by the rule:

This rule will impact local health agents and the retail food and recreational establishments currently licensed and inspected by these entities.

6. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

DHS estimates that it will use approximately 0.50 FTE staff time to develop this rule. This includes research, drafting, preparing related documents, holding public hearings, and communication with affected persons and groups. DHS will assign existing staff to develop this rule. DHS will work jointly with DATCP staff, who are separately proposing to revise ATCP 75

and ATCP 75 Appendix, to facilitate seamless consolidation of DHS 192 and subch. III of ATCP 75 into ch. ATCP 74.

7. Anticipated economic impact

The proposed rule is not expected to have any negative economic impact and will positively affect state and local food safety inspectors and public health. As part of the larger initiative to consolidate and streamline Wisconsin's food safety programs, it will remove unnecessary duplication of regulations and create a comprehensive, streamlined system for the oversight of local health agents.

Both DATCP and DHS will work closely with stakeholders to ensure the rule revisions protect public health without imposing an undue economic burden on local health agents or the industries they regulate. Proposed rule revisions will not raise fees.

Contact Person: Jim Kaplanek, Food Safety and Recreational Licensing Section Chief, (608) 261-8361, James.kaplanek@wisconsin.gov.



Secretary
Department of Health Services

Date Submitted

STATEMENT OF SCOPE

Department of Health Services

(DHS)

Rule No.: DHS 196 (Restaurants) and DHS 196 Appendix (Wisconsin Food Code)

Relating to: Restaurants

1. Description of the objective of the rule:

The primary objective of this rule revision is to amend DHS 196 Appendix, "Wisconsin Food Code," to conform to the 2013 FDA model Food Code and with policies and procedures used by both the Department of Health Services (DHS) and the Department of Agriculture, Trade and Consumer Protection (DATCP) in current food safety practice, and to reflect additional modifications proposed by the National Conference on Food Protection (NCFP). This rule revision will also identify approaches for consolidating DHS 196 and DHS 196 Appendix with DATCP's chs. ATCP 75 (Retail Food Establishments) and ATCP 75 Appendix (Wisconsin Food Code).

This proposed consolidation of these chapters in the administrative code is part of a mandated initiative to transfer food safety and recreational licensing regulations from DHS to DATCP. 2015 Wisconsin Act 55 authorized the transfer of DHS's Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety, effective July 1, 2016. As part of that consolidation, DHS 196 will be renumbered as subch. III of ch. ATCP 75 on the effective date of the transfer. Since both DATCP and DHS adopt identical versions of the Wisconsin Food Code, only one version of the amended Wisconsin Food Code, will continue to be adopted as an appendix to the amended version of ch. ATCP 75, after the effective date of the transfer.

DHS will work cooperatively with DATCP to establish a Food Code Advisory Committee consisting of stakeholders to provide advice on the content of rule amendments and best approaches for consolidating rules. Adopting this scope statement will allow DHS and DATCP to begin work amending chs. DHS 196 and DHS 196 Appendix and identifying approaches for consolidating portions of ch. DHS 196 in ch. ATCP 75 in preparation for the upcoming consolidation.

To avoid delay in creating an updated food code, reconciling the food codes and providing more efficient service to the regulated community the rulemaking process will begin with this statement of scope from DHS and will continue and be completed by DATCP so that a rule will be in effect as soon after the transfer date as possible.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

History and Background. Under current law, DHS and DATCP divide regulatory authority over food safety. Under ch. DHS 196, DHS regulates food safety in restaurants. Under ch. ATCP 75, DATCP regulates food safety in retail food establishments such as grocery stores, supermarkets and most convenience stores. 2015 Wisconsin Act 55 transfers regulatory authority over food safety in restaurants from DHS to DATCP on July 1, 2016. From a regulatory perspective, restaurants will be categorized a type of retail food establishment.

The federal Model Food Code is fully updated every four years to provide practical, science-based guidance and enforceable provisions for mitigating risk factors known to cause foodborne illness. The 2013 federal Model Food Code is the most recent full edition published by the FDA. However, the current Wisconsin Food Code, appended to ch. ATCP 75 for retail food establishments and to ch. DHS 196 for restaurants, is based on the 2009 version of the federal Model Food Code.

Consolidation with DATCP Division of Food Safety. The transfer of DHS's Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety will improve services for Wisconsin's food and recreational industries. It will create a "one-stop" contact point for restaurants and retail food establishments, making it easier to quickly get licensing and other regulatory information. Most significantly for this proposed rule revision, it will continue consistent oversight of restaurants and other retail food establishments in Wisconsin. Both restaurants and retail food establishments (grocery stores, etc.) are regulated under the same Wisconsin food code. Having one agency interpret the Wisconsin Food Code using one set of regulations will encourage consistency. Amending DHS 196 Appendix, the Wisconsin Food Code, will ensure that stakeholders have a rule that is based on the updated guidance.

Proposed Policies. The proposed rule aims to revise the Wisconsin Food Code to incorporate changes in the 2013 federal Model Food Code, while retaining certain regulations that are unique to Wisconsin. This rule will ensure that the Wisconsin Food Code is in step with the latest model food safety regulations, which will reduce confusion and increase efficiency for concerned stakeholders in the retail food and restaurant industries.

The proposed rule will also explore approaches for reconciling any differences between chs. ATCP 75 and DHS 196 in order to facilitate the transfer of regulatory authority over food safety in restaurants from DHS to DATCP. On July 1, 2016, DHS 196 will be renumbered as subch. III as a replacement for the current subch. III of ch. ATCP 75. The consolidation will eliminate the need to publish two duplicative versions of the Wisconsin Food Code. Reconciling any differences between chs. ATCP 75 and DHS 196 will bring consistency to DATCP's rules and provide clarity to concerned parties in the retail food and restaurant industries. Integrating ch. DHS 196 with ch. ATCP 75 may involve renumbering and amending provisions, repealing, or repealing and recreating, and combining provisions.

Related Rulemaking Activities. This scope statement is one of three scope statements prepared by DHS to facilitate the transfer of the Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety. The other scope statements are for chs. ATCP 192 and 198.

After July 1, 2016, regulatory authority for DHS 192 (Cities, Counties, and Villages Designated as Agents of the Department for Public Health) will be transferred to DATCP and DHS 192 will be renumbered as a newly created ATCP 74 (Local Agents and Regulation). At that time, subch. III of ATCP 75 (Local Regulation of Retail Food Establishments) will also become a subchapter of ATCP 74.

DHS has also prepared a scope statement for DHS 198 (Vending of Food). DHS 198 will be renumbered as a newly created subch. IV of ATCP 75 on July 1, 2016. DHS and DATCP staff will work with stakeholders to evaluate the content of DHS 198 and determine whether or how to streamline these regulations, transferring relevant provisions into ATCP 75 Appendix (Wisconsin Food Code) and eliminating any duplicative provisions.

In addition to the three scope statements prepared by DHS, DATCP has also prepared a scope statement for ATCP 75 and ATCP 75 Appendix to amend regulations related to retail food establishments and to consolidate DHS restaurant and vending regulations transferred to DATCP on July 1, 2016.

Policy Alternatives. Do nothing. If DHS and DATCP do nothing, then the Wisconsin Food Code will be out of step with the current federal Model Food Code. In addition, food business operators will have to meet requirements for sous vide processing and reduced oxygen packaging that are more onerous than those now accepted as sufficient for safety. The Wisconsin Food Code's provisions may no longer be based on the latest science and food customers may be protected less effectively and efficiently. Furthermore, if DHS and DATCP do not reconcile differences between chs. ATCP 75 and DHS 196 in light of the transfer of regulatory authority over food safety in restaurants, then concerned parties may be faced with conflicting rules across the range of retail food establishment activities. If DHS and DATCP do not begin identifying approaches for integrating rules that are scheduled to be transferred, it will delay implementation of a simplified, streamlined regulatory system for Wisconsin's retail food industry.

3. Statutory authority for the rule (including the statutory citation and language): Statutory Authority: Sections 227.14 (1s) and 254.74 (1), Stats.

227.14 Preparation of proposed rules.

(1s) Exception; preparation of certain rules based on federal food code.

Notwithstanding sub. (1), if the department of agriculture, trade and consumer protection or the department of health services prepares a proposed rule based on the model food code published by the federal food and drug administration, the proposed rule may be in the format of the model food code.

254.74 Powers of the department and local health departments.

(1) The department shall do all of the following: (a) Administer and enforce this subchapter, the rules promulgated under this subchapter and any other rules or laws relating to the public health and safety in hotels, tourist rooming houses, bed and breakfast establishments, restaurants, vending machine commissaries, vending machines and vending machine locations.

(am) Promulgate rules, in consultation with the department of safety and professional services, under which the department of health services shall conduct regular inspections of sealed combustion units, as required under s. 101.149 (5) (c), for carbon monoxide emissions in hotels, tourist rooming houses, and bed and breakfast establishments. The rules shall specify conditions under which it may issue orders as specified under s. 101.149 (8) (a). The rules may not require the department of health services to inspect sealed combustion units during the period in which the sealed combustion units are covered by a manufacturer's warranty against defects.

(b) Require hotels, tourist rooming houses, restaurants, vending machine operators and vending machine commissaries to file reports and information the department deems necessary.

(c) Ascertain and prescribe what alterations, improvements or other means or methods are necessary to protect the public health and safety on those premises.

(d) Prescribe rules and fix standards, including rules covering the general sanitation and cleanliness of premises regulated under this subchapter, the proper handling and storing of food on such premises, the construction and sanitary condition of the premises and equipment to be used and the location and servicing of equipment. The rules relating to the public health and safety in bed and breakfast establishments may not be stricter than is reasonable for the operation of a bed and breakfast establishment, shall be less stringent than rules relating to other establishments regulated by this subchapter and may not require 2nd exits for a bed and breakfast establishment on a floor above the first level.

4. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

There is no federal law related to retail food establishments, including restaurants. The FDA publishes the federal Model Food Code as a model for states to use in developing its food safety regulations for retail food establishments.

5. Description of all entities that may be impacted by the rule:

This rule will revise regulations for restaurants currently licensed and inspected by DHS or its local city and county agents.

6. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

DHS estimates that it will use approximately 0.50 FTE staff time to develop this rule. This includes research, drafting, preparing related documents, holding public hearings, and communication with affected persons and groups. DHS will assign existing staff to develop this rule. DHS will work jointly with DATCP staff, who are separately proposing to revise ATCP 75 and ATCP 75 Appendix, to facilitate seamless consolidation of DHS 196 and ATCP 75.

7. Anticipated economic impact

The proposed rule is not expected to have any negative economic impact and will positively affect operators of food service operations, state and local food safety inspectors and public health. By adopting the most current practices in food safety, the proposed rule revision will ensure Wisconsin's food regulations reflect best practice for protecting public health. If adopted, the proposed rule will include less onerous provisions for sous vide processing and reduced oxygen packaging. As part of the larger initiative to consolidate and streamline Wisconsin's food safety programs, it will remove unnecessary duplication of regulations and ensure consistent interpretation of retail food regulations. It will make it easier for retail food establishment operators, including restaurant owners, to know who to contact for information with licensing and regulatory questions.

Both DATCP and DHS will work closely with stakeholders to ensure the rule revisions protect public health without imposing an undue economic burden. The rule will not raise fees.

Contact Person: Jim Kaplanek, DHS Food Safety and Recreational Licensing Section Chief, (608) 261-8361, James.kaplanek@wisconsin.gov.

Kitty Rhoades
Secretary
Department of Health Services



Date Submitted

STATEMENT OF SCOPE

Department of Health Services

(DHS)

Rule No.: DHS 198 (Vending of Food)

Relating to: Transfer of Vending of Food Regulations to DATCP

1. Description of the objective of the rule:

The objectives of this rule revision are to amend and modernize DHS 198, consolidate the rule with the Wisconsin Food Code and facilitate the transfer of the rule to the Department of Agriculture, Trade and Consumer Protection (DATCP).

This proposed rule revision is part of an initiative to transfer food safety and recreational licensing regulations from the Department of Health Services (DHS) to DATCP. 2015 Wisconsin Act 55 authorized the transfer of DHS's Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety, effective July 1, 2016. As part of that consolidation, DHS 198 will be renumbered as subch. IV of ch. ATCP 75 on the effective date of the transfer.

Although the rule will be transferred and incorporated into DATCP's ATCP 75 on July 1, 2016, revisions to the rule will be necessary to modernize it. In addition, if this scope statement is approved, certain provisions of DHS 198 will be incorporated into ATCP 75 Appendix (Wisconsin Food Code).

DHS will collaborate with DATCP to establish a Food Code Advisory Committee consisting of stakeholders who will provide advice on the content of rule amendments and best approaches for consolidating rules.

Adopting this scope statement will allow DHS and DATCP to begin work amending DHS 198 and identifying approaches for consolidating the rule into ATCP 75 and ATCP 75 Appendix in preparation for the upcoming consolidation. To avoid delay in modernizing the regulations so that they reflect current industry practice, providing improved service and providing consistent oversight of retail food establishments the rulemaking process will begin with this statement of scope from DHS and will continue and be completed by DATCP so that a rule will be in effect as soon after the transfer date as possible.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

History and Background. Section 254.74, Stats., gives the department authority to develop rules for vending machine commissaries and vending machines and their location and servicing.

Vending machines are described as “any self-service device offered for public use which, upon insertion of a coin or token, or by other means, dispenses unit servings of food or beverage either in bulk or in package, without the necessity of replenishing the device between each vending operation.” It does not include devices which dispense only bottled, prepackaged or canned soft drinks or items such as candy, gum, nuts, nut meats, cookies or crackers or prepackaged grade A pasteurized milk or milk products.

Vending commissaries, on the other hand, means “any building, room or place in the state at which foods, containers, transport equipment or supplies for vending machines are kept, handled, prepared or stored by a vending machine operator.”

Vending machine location means the room, enclosure, space or area where one or more vending machines are installed and operated.

Vending machine operator means the person maintaining a place of business in the state and responsible for the operation of one or more vending machines.

Consolidation with DATCP Division of Food Safety. The transfer of DHS’s Food Safety and Recreational Licensing Section to DATCP’s Division of Food Safety will improve services for Wisconsin’s food and recreational industries. It will create a “one-stop” contact point for retail food establishments, including vending machine and vending commissary operators, making it easier to quickly get licensing and other regulatory information. It will continue consistent oversight of retail food establishments in Wisconsin, by having one agency interpret the Wisconsin Food Code using one set of regulations. Consolidating DHS 198 into existing retail food establishment regulations will further promote the goals of the transfer by streamlining and consolidating Wisconsin’s food safety regulations.

Proposed Policies. If adopted, the proposed rule will update and modernize specific provisions of DHS 198 to reflect current best practice, including updating temperature requirements and addressing the newly emerging business of “micro-markets”, which have operational features of a convenience store and a vending machine.

Working with stakeholders, DHS and DATCP staff will review DHS 198 to identify the best approach for consolidating its provisions with ch. ATP 75 and ATP 75 Appendix after DHS’s food safety and recreational license program is transferred to DATCP on July 1, 2016. At that time, DHS 198 will be renumbered as subch. IV of ch. ATP 75. Additional rulemaking activities will evaluate whether and to what extent to incorporate food safety provisions from DHS 198 into ATP 75 Appendix (Wisconsin Food Code) to further streamline the rule and remove duplication. The Wisconsin Food Code already includes several provisions related to ensuring the safety of food dispensed from vending machines, which may allow certain provisions from DHS 198 to either be removed or incorporated into existing provisions and streamlined. The rulemaking workgroup will assess whether to establish a separate chapter in the Wisconsin Food Code dedicated specifically to vending machines and vending commissaries.

Related Rulemaking Activities. This scope statement is one of three scope statements prepared by DHS to facilitate the transfer of the Food Safety and Recreational Licensing Section to DATCP's Division of Food Safety. The other scope statements are for chs. DHS 192 and DHS 196 and its appendix.

After July 1, 2016, regulatory authority for DHS 192 (Cities, Counties, and Villages Designated as Agents of the Department for Public Health) will be transferred to DATCP and DHS 192 will be renumbered as a newly created ATPC 74 (Local Agents and Regulation). At that time, subch. III of ATPC 75 (Local Regulation of Retail Food Establishments) will become a subchapter of ATPC 74.

The department has also prepared a scope statement for DHS 196 (Restaurants) and DHS 196 Appendix (Wisconsin Food Code). The goal of that rule revision is to update the food code to reflect the most recent version of the FDA model food code and to consolidate DHS 196 with the DATCP's ATPC 75.

In addition to the three scope statements prepared by DHS, DATCP has also prepared a scope statement for ATPC 75 and ATPC 75 Appendix to amend regulations related to retail food establishments and to consolidate DHS restaurant and vending regulations transferred to DATCP on July 1, 2016.

Policy Alternatives. Do nothing. DHS 198 will be transferred to DATCP on July 1, 2016 and incorporated into a newly created subch. IV of ATPC 75. If DHS and DATCP do nothing further, ch. ATPC 75 will include provisions that are duplicative and contrary to provisions in the Wisconsin Food Code related to vending machines and commissaries. If DHS and DATCP do not begin identifying approaches for integrating rules that are scheduled to be transferred, it will delay implementation of a simplified, streamlined regulatory system for Wisconsin's retail food industry.

3. Statutory authority for the rule (including the statutory citation and language): Statutory Authority: Sections 227.14 and 254.74 (1), Stats.

227.14 Preparation of proposed rules.

(1s) Exception; preparation of certain rules based on federal food code.

Notwithstanding sub. (1), if the department of agriculture, trade and consumer protection or the department of health services prepares a proposed rule based on the model food code published by the federal food and drug administration, the proposed rule may be in the format of the model food code.

254.74 Powers of the department and local health departments.

(1) The department shall do all of the following: (a) Administer and enforce this subchapter, the rules promulgated under this subchapter and any other rules or laws relating to the public health and safety in hotels, tourist rooming houses, bed and

breakfast establishments, restaurants, vending machine commissaries, vending machines and vending machine locations.

(am) Promulgate rules, in consultation with the department of safety and professional services, under which the department of health services shall conduct regular inspections of sealed combustion units, as required under s. 101.149 (5) (c), for carbon monoxide emissions in hotels, tourist rooming houses, and bed and breakfast establishments. The rules shall specify conditions under which it may issue orders as specified under s. 101.149 (8) (a). The rules may not require the department of health services to inspect sealed combustion units during the period in which the sealed combustion units are covered by a manufacturer's warranty against defects.

(b) Require hotels, tourist rooming houses, restaurants, vending machine operators and vending machine commissaries to file reports and information the department deems necessary.

(c) Ascertain and prescribe what alterations, improvements or other means or methods are necessary to protect the public health and safety on those premises.

(d) Prescribe rules and fix standards, including rules covering the general sanitation and cleanliness of premises regulated under this subchapter, the proper handling and storing of food on such premises, the construction and sanitary condition of the premises and equipment to be used and the location and servicing of equipment. The rules relating to the public health and safety in bed and breakfast establishments may not be stricter than is reasonable for the operation of a bed and breakfast establishment, shall be less stringent than rules relating to other establishments regulated by this subchapter and may not require 2nd exits for a bed and breakfast establishment on a floor above the first level.

4. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

There is no federal law regulation of vending machines and vending commissaries. The FDA publishes the federal Model Food Code, which includes provisions related to vending machines, as a model for states to use in developing its food safety regulations for retail food establishments. Wisconsin has adopted most of the provisions of the FDA Model Food Code, including provisions related to vending machines.

5. Description of all entities that may be impacted by the rule:

This rule will revise regulations for vending machine and vending commissary operators licensed and inspected by DHS or its local city and county agents.

6. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

DHS estimates that it will use approximately 0.25 FTE staff time to develop this rule. This includes research, drafting, preparing related documents, holding public hearings, and communication with affected persons and groups. DHS will assign existing staff to develop this rule. DHS will work jointly with DATCP staff, who are separately proposing to revise ATCP 75 and ATCP 75 Appendix, to facilitate seamless consolidation of DHS 198 and ATCP 75.

7. Anticipated economic impact

The proposed rule is not expected to have any negative economic impact and will positively affect operators of vending machines and vending commissaries, state and local sanitarians. By adopting the most current practices in food safety, the proposed rule revision will ensure Wisconsin's regulations reflect best practice for protecting public health. As part of the larger initiative to consolidate and streamline Wisconsin's food safety programs, it will remove unnecessary duplication of regulations and ensure consistent interpretation of vending machine and vending commissary regulations.

Both DATCP and DHS will work closely with stakeholders to ensure the rule revisions protect public health without imposing an undue economic burden. The rule will not raise fees.

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Date Submitted